

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

BYRON SCOTT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-06-725-HE
	)	
COMANCHE COUNTY	)	
DETENTION CENTER, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**REPORT AND RECOMMENDATION**

Plaintiff Byron Scott is a state inmate complaining about the conditions of his confinement. The Court should summarily dismiss the action without prejudice for failure to plead exhaustion of available administrative remedies.<sup>1</sup>

Mr. Scott claims that officials had ignored his “emergency grievance” for protection, resulting in an attack by fellow inmates. Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 at p. 2 (July 3, 2006) (“Complaint”).

Federal law provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2000). “[T]he [Prison Litigation Reform Act] exhaustion requirement requires proper exhaustion” of the prison’s

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<sup>1</sup> The Court can address the exhaustion issue *sua sponte*. See *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1210-11 (10th Cir. 2003).

administrative remedies,<sup>2</sup> and the prisoner must plead compliance.<sup>3</sup> When the prisoner fails to comply with this duty for even a single claim, the Court must ordinarily dismiss the entire action. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10th Cir. 2004).

Under the Oklahoma Department of Corrections (“DOC”) grievance policy, an inmate must initially attempt informal resolution of the complaint.<sup>4</sup> *See* Inmate/Offender Grievance Process, OP-090124 at p. 5 (eff. Oct. 11, 2005). If informal communication does not resolve the issue, the inmate must file a request to staff. *See id.* at pp. 5-6.

If the dispute remains unresolved, the inmate can file a grievance. *See id.* at pp. 6-7. The DOC policy dictates that if a complaint cannot be resolved through a grievance or if the grievance goes unanswered for 30 days, the inmate should proceed to the administrative review authority. *See id.* at p. 8. Exhaustion is complete only when the inmate seeks relief through the administrative review authority. *See id.* at pp. 10-11.

The Plaintiff has not alleged that he has taken any of the necessary steps concerning the:

- failure to heed his request for protection, or

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<sup>2</sup> *Woodford v. Ngo*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2378, 2387 (2006).

<sup>3</sup> *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209-11 (10th Cir. 2003).

<sup>4</sup> Mr. Scott’s documents reflect the need to follow the DOC grievance policy. *See* Complaint, Attachment 1 at p. 3 (instructing the Plaintiff to follow the guidelines listed in DOC OP-090124). This policy is subject to judicial notice. *See Ray v. Aztec Well Service Co.*, 748 F.2d 888, 889 (10th Cir. 1984) (“This court can take judicial notice of agency rules and regulations.”); *accord Morrow v. Collins*, 111 F.3d 374, 375 (5th Cir. 1997) (*per curiam*) (“We take judicial notice of the recently established [Texas Department of Criminal Justice] procedures . . .”).

- the subsequent attack by fellow inmates.

As a result, the entire action should be dismissed<sup>5</sup> without prejudice.<sup>6</sup>

Mr. Scott may object to this report and recommendation. *See* 28 U.S.C. § 636(b)(1) (2000). Any such objection must be filed with the Court Clerk for the United States District Court. *See Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999). The deadline for objections is September 14, 2006. *See* W.D. Okla. LCvR 72.1(a). The failure to timely object to this report and recommendation would constitute a waiver of the Plaintiff's right to appellate review of the suggested ruling. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Upon affirmance or waiver of the right to appeal,<sup>7</sup> the suggested dismissal would count as a "prior occasion" for purposes of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (2000).<sup>8</sup>

The referral to the undersigned is terminated.

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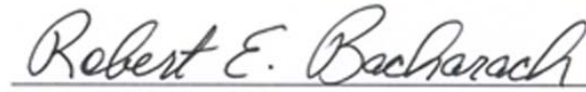
<sup>5</sup> *See supra* p. 2.

<sup>6</sup> *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003) ("A dismissal based on lack of exhaustion . . . should ordinarily be without prejudice.").

<sup>7</sup> *Jennings v. Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir. 1999) ("A district court dismissal under 28 U.S.C. § 1915(e)(2)(B) does not count as a strike until after the litigant has exhausted or waived his opportunity to appeal.").

<sup>8</sup> *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003) (stating that a dismissal for nonexhaustion "may constitute a strike for purposes of 28 U.S.C. § 1915(g)" (citation omitted)).

Entered this 24th day of August, 2006.

A handwritten signature in cursive script, reading "Robert E. Bacharach", written in black ink on a light-colored background.

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Robert E. Bacharach

United States Magistrate Judge